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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of Putnam County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury's award of compensatory damages that is based on no record evidence of loss to the plaintiff violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause guarantees meaningful judicial review of a jury verdict to ensure that an award of damages is based on at least some record evidence.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Emerson Electric Company and Daniel Industries, Inc., were defendants below, but prevailed at trial and are respondents under this Court's Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Emerson Electric Company is the parent company of Daniel Measurement Services, Inc., and that no other publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Measurement Services, Inc. ("DMS") respectfully submits this petition for a writ of certiorari to review the judgment of the Circuit Court of Putnam County, West Virginia.

OPINIONS BELOW

The orders of the Circuit Court denying DMS's motions for judgment as a matter of law, for a new trial, and for reconsideration are unreported. Pet. App. 1a–5a, 9a–26a. The orders of the West Virginia Supreme Court of Appeals denying DMS's petition for discretionary review and dismissing Eagle Research Corporation's appeal are also unreported. *Id.* at 27a–28a, 31a–32a.

JURISDICTION

The Circuit Court entered final judgment and denied reconsideration on August 18, 2006. Pet. App. 22a–26a. The West Virginia Supreme Court of Appeals denied DMS's petition for appeal on May 22, 2007, but granted respondent's cross-petition for appeal. *Id.* at 27a–28a, 29a–30a. Shortly thereafter, respondent moved to dismiss its own appeal. The Supreme Court of Appeals granted that motion and dismissed the appeal on June 27, 2007. *Id.* at 31a–32a. On July 31, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 19, 2007. No. 07A83. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This case provides the Court with the opportunity to clarify an important issue of constitutional civil procedure: the extent to which the Due Process Clause restrains a jury from awarding compensatory damages based on no record evidence. In the proceedings below, the jury entered a damages award of more than $10 million, apparently on a theory on which it was never instructed. Compounding the error, the trial judge completely abdicated judicial review of the verdict, recognizing the evident problem but allowing the award to stand without making any effort to determine whether a basis could be found in the record. And the State's sole appellate court denied discretionary review, meaning that *no* court has applied reasoned judgment to scrutinize the jury's verdict. This case therefore presents the Court with an ideal vehicle to consider the minimum process necessary for petitioner to be "deprive[d] of life, liberty, or property."

1. DMS developed a business concept for a system of remote terminal units ("RTUs") that would monitor the rate at which gas was flowing through a gas pipeline, transmit the data to central locations, and charge the pipeline owner a fee for viewing the data on a secure website. One necessary component of any such system was a flow measurement device,

and DMS solicited proposals from manufacturers of such devices. DMS asked bidders to assume that it would purchase 3,000 devices annually, but never committed to purchase 3,000 devices.

DMS selected respondent Eagle Research Corp. as a potential supplier based on its proposal. While they worked together to develop a workable RTU system, DMS and respondent executed a written confidentiality agreement that prohibited the sharing of each other's technology with third parties.

Ultimately, the project failed. Respondent developed several prototypes, which DMS bought using individual written purchase orders. And the two companies even exchanged nonbinding term sheets for a future purchase of flow measurement devices. But no written contract was ever signed, and despite having paid respondent more than $1 million over the life of the project, DMS decided to abandon the enterprise. DMS paid respondent $138,000 to settle all outstanding charges.

2. Despite the settlement, two years later, in April 2003, respondent sued DMS and two other companies in the Circuit Court of Putnam County, West Virginia. Respondent alleged that DMS had breached an oral contract to purchase 3,000 of its devices, and had misappropriated respondent's trade secrets. Evidence subsequently came to light that the design of respondent's flow measurement devices was not, in fact, a trade secret, and respondent abandoned that claim. Instead, it amended its complaint to assert a similar claim for breach of the confidentiality agreement.

The case went to trial. Respondent offered no testimony from any economist, accountant, or other financial expert to ascertain losses caused proxi-

mately by the alleged breach of the confidentiality agreement. Respondent's sole attempt to present such evidence—testimony by its principal about a purported "loss of competitive advantage" resulting from the alleged breach—failed for lack of foundation; respondent was forced to withdraw it, and the court precluded it. Pet. App. 34a–36a. Thus, there was no evidence that respondent suffered *any* ascertainable losses from DMS's supposed breach.

The judge instructed the jury accordingly:

> If you find by a preponderance of the evidence that the defendant, DMS, breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible, *for reasonable ascertainable losses caused proximately by the breach.*

Pet. App. 44a (emphasis added). Respondent has agreed that this charge was a correct statement of the law. *Id.* at 7a, 41a–43a. Respondent initially proposed another instruction, which would have told the jury that the measure of damages for the confidentiality claim was "Eagle's lost profits; or the Defendants' actual profits, whichever amount is greater." Plaintiff's Instruction No. 30-B. The trial judge sustained DMS's objection to this instruction, however. *See* Pet. App. at 42a, 43a–45a.

Despite the instruction to award only "reasonable ascertainable losses," the jury returned a verdict against DMS. The verdict awarded $10.5 million in consequential damages for breach of the confidentiality agreement and $4 million in consequential damages for breach of an oral contract. *See* Pet. App. 3a–4a.

3. DMS filed a timely post-judgment motion challenging the verdict. DMS's motion pointed out that there was no evidence in the record that could possibly sustain either the $10.5 million award or the $4 million award. Respondent did not counter with any evidence of damage to itself in the record—indeed, at the motion hearing, respondent's counsel told the court, "And what the jury was thinking in the jury room, one can only surmi[s]e. Who knows what they were thinking[?]" Pet. App. 8a. All respondent could offer was speculation that the jury might have awarded damages of $10.5 million based upon a theory of disgorgement of profits, even though the jury was never instructed upon such a theory. *See id.* at 8a, 53a–56a.

Ultimately, the trial judge denied DMS's post-trial motion as to the $10.5 million award, stating:

> I'm going to deny the defense motion [to set aside the confidentiality verdict] . . . though *I will tell you that I'm concerned with it.* . . . I did not instruct the jury that they could take their profits away from them. . . . And I'll be frank with you, I cannot recall now whether the plaintiffs at that time said, "Judge, this is a wrong instruction . . . ." I don't have a memory of that. I don't think you did, I'm not sure. *I can't wade through them all at this stage, and so I'm going to leave that as it is.*

Pet. App. 12a–13a (emphases added). Subsequently filed transcripts confirmed that respondent had *not*, in fact, objected to the jury instruction on damages, yet the trial court left the judgment in place. The trial court did, however, reduce the $4 million in breach of contract damages to a sum slightly less than $2 million.

4. DMS sought discretionary review in the West Virginia Supreme Court of Appeals, the sole appellate court in the State. DMS explained to the Supreme Court of Appeals that "the award of $10.5 million in damages to [respondent] for an alleged breach of the confidentiality agreement cannot be sustained without violating DMS' due process rights under the federal and state constitutions." Pet. for Appeal 49. Respondent cross-petitioned for appeal, seeking to have its full $4 million in contract damages reinstated.

The Supreme Court of Appeals voted 3–2, with Justices Albright and Benjamin dissenting, to decline DMS's appeal. Pet. App. 27a–28a. The court did vote unanimously to hear respondent's appeal (which would have permitted DMS to cross-assign as error the $10.5 million damages award, *see* W. Va. R. App. P. 10(f)), but to prevent further review, respondent sought and was granted permission to dismiss its own appeal. Pet. App. 29a–30a, 31a–32a.

REASONS FOR GRANTING THE PETITION

A jury's award of money damages, if not based on the law and the evidence, is nothing more than the use of state power to redistribute wealth at a few citizens' whim. The Due Process Clause guards against that eventuality by requiring a minimum level of rationality in the jury process—rationality that is wholly absent when a jury acts without evidence. Indeed, "the protection of the individual against arbitrary action" of this sort is the central aim of the due process guarantee. *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 302 (1937); *see TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (plurality op.); *id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment)

("[The Constitution's] fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property.").

This case squarely implicates that settled rule. Indeed, in this case the record plainly demonstrates that the jury awarded the plaintiff more than $10 million in damages without *any* basis for that sum in the theory on which it was instructed. The trial judge stated that he was "concerned with [the verdict]," but he declined to set it aside because he could not recall whether he had given an instruction that might have justified the award. (The transcript, prepared subsequently, demonstrates that there was no such instruction. *See* Pet. App. 41a.) Accordingly, the jury's award is a naked deprivation of due process, and the West Virginia courts' complete failure to review it is contrary to the precedents of this Court.

The petition for a writ of certiorari should be granted to underscore that the Constitution requires a jury's award of damages—in any form—to be based on the law and the evidence, and that judges are constitutionally obliged to exercise meaningful review and control over the verdicts entered in their courtrooms.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

When a jury is sent off to deliberate with only the most general instructions to limit its "'wide discretion in choosing amounts'" of damages, the defendant faces "'an acute danger of arbitrary deprivation of property.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Without a proper foundation in law, the jury's use of state power to seize property is nothing more than "arbi-

trary coercion" whose "basic unfairness" violates the Due Process Clause. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring, joined by O'Connor and Souter, JJ.). "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Id.*

This Court has made clear over the years that this bedrock principle of the Fourteenth Amendment applies to *all* jury awards. Its recent holdings on that subject, however, have come primarily in the context of punitive damages. This Court should use this case to clarify, and re-emphasize, that every damages verdict must comport with due process: the constitutional prohibition on arbitrary, standardless jury awards "is not to be avoided by the simple label a State chooses to fasten upon its conduct." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

A. The jury "is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). A jury's judgment therefore must comply with the guarantees of due process. *See, e.g.*, *Gore*, 517 U.S. at 572 n.17; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.").

The substance of those due process guarantees is drawn in the first instance from the common law.

"As this Court has stated from its first due process cases," the longstanding procedural protections of the common law "provide[] a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430. When a state court abrogates common-law procedures, it denies litigants the protections that informed the framing of the Fourteenth Amendment and its Due Process Clause. *See id.* Accordingly, "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication," this Court "has not hesitated to find the proceedings violative of due process." *Id.*

One of the common law's bedrock protections was the judicial power—and duty—to invalidate a jury verdict unsupported by evidence. *See, e.g.*, 3 William Blackstone, Commentaries on the Laws of England *387–88 (describing the "extremely ancient" powers of courts to set aside a "verdict . . . contrary to evidence" or "giv[ing] exorbitant damages"); *Herron v. S. Pac. Co.*, 283 U.S. 91, 95 (1931). Indeed, the very size of a jury's damage award could alone be sufficient evidence that the jury had acted not according to law, but according to "passion or prejudice."

With this firm basis in the common law, this Court's due process cases have long recognized that a jury's judgment must rest on more than just the jurors' say-so, because unchecked discretion would allow verdicts to be based on irrational and even invidious grounds. *See, e.g.*, *Oberg*, 512 U.S. at 432 (when a jury instruction "leave[s] the jury with wide discretion in choosing amounts," and when the jury hears "evidence of a defendant's net worth," the defendant faces an impermissible risk "that juries will use their verdicts to express biases against big businesses"). To be valid, the jury's verdict must have a basis in the record evidence. *See, e.g.*, *TXO*, 509 U.S.

at 468 (Kennedy, J., concurring in part and concurring in the judgment) ("It is a commonplace that a jury verdict must be reviewed in relation to the record before it. . . . [A] jury is bound to consider only the evidence presented to it in arriving at a judgment." (citations omitted)).

B. Applying these longstanding principles, this Court has repeatedly invalidated both damages awards based on jurors' arbitrary preferences and States' attempts to insulate those awards from judicial review. The jury verdict in this case, and the West Virginia judiciary's failure to exercise *any* meaningful review of that verdict at either the trial or the appellate level, is contrary to these holdings and warrants this Court's review.

The leading decision is *Oberg*, in which this Court invalidated an Oregon law—unique in the Nation—precluding judicial review of the amount of punitive damages awards. Trial judges could set aside a damage award if based on no evidence whatsoever, but could not reduce or remit an award, or grant a new trial based on an award's grossly disproportionate amount. *See* 512 U.S. at 426–27. The Court held that this significant abrogation of one of the common law's key procedural protections violated the Due Process Clause, because—as discussed above—the risk that juries will act arbitrarily is a significant one. Oregon's procedure eliminated judicial supervision without replacing it with any comparable safeguard. *See id.* at 432. That was contrary to due process, because the decision to award punitive damages "should not be committed to the unreviewable discretion of a jury." *Id.* at 435; *accord id.* at 436 (Scalia, J., concurring) ("The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for en-

forcing state-prescribed limits upon such deprivation violates the Due Process Clause.").

Oberg built on the broad agreement in *TXO* that postverdict review is constitutionally required. Indeed, Justice Scalia's *TXO* concurrence specifically addressed the situation here: "Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and *judicial review of the reasonableness of jury-awarded compensatory damages* (including damages for pain and suffering) . . . ." *TXO*, 509 U.S. at 471 (Scalia, J., concurring in the judgment, joined by Thomas, J.) (emphasis added). Justices Scalia and Thomas were the decisive votes for the Court's judgment in *TXO*. Justice O'Connor, dissenting for herself and Justices White and Souter, agreed with Justice Scalia and explained that the availability of postverdict judicial review had been essential to the Court's earlier cases sustaining suspiciously large punitive damages awards. *Id.* at 496–97 (O'Connor, J., dissenting). By contrast, in *TXO* the trial court had ruled summarily from the bench with no written findings, and "the Supreme Court of Appeals of West Virginia did not do much better," affirming in "three conclusory sentences." *Id.* at 497–98.

Thus, five Justices in *TXO* agreed that the Constitution requires postverdict review of the size of a damages award. It follows naturally that no matter how the constitutional minimum is described, postverdict review is *per se* inadequate if it permits a verdict to stand based on no evidence at all.

Here, the West Virginia courts' wholesale abdication of the judicial role required by the Due Process Clause was even *more* egregious than in *Oberg*. Oregon's procedure was constitutionally inadequate even

though an Oregon trial court could review punitive damage verdicts for a *complete* lack of evidence, and even though the trial court's rulings would be appealable as of right to the Oregon Court of Appeals. *See Oberg*, 512 U.S. at 419, 426–27. The circuit court in this case refused even to provide the minimal scintilla of process that was held inadequate in *Oberg*: the court acknowledged that it was "concerned" by the damage award, and identified no evidence consistent with the instructions with which to sustain it—but then left it in place. And whereas the Oregon court system allows an appeal as of right, which would have permitted further review when a trial court let stand a verdict based on no evidence, there is no appeal of right in West Virginia's two-tier system. No one can appeal until a majority of the Supreme Court of Appeals grants permission. Here, the discretionary denial of review meant that the jury's verdict was *never* reviewed on the merits, because the trial court failed to render a reasoned decision. That procedure is entirely inadequate in these circumstances.

C. *Oberg* and *TXO* happened to involve punitive damages, whereas this case involves compensatory damages. That is no basis for distinguishing this Court's reasoning.

Punitive damages are hardly constitutionally unique, just as their review at common law was not unique. Rather, the Court's cases applying excessiveness review have come in punitive damages cases because so many States had begun to give juries virtually unrestricted discretion to award punitive damages. Compensatory damages, by contrast, might appear at first blush to pose a lesser risk of arbitrary deprivation, because compensatory damages are intended to be capped by the amount of

proven harm, whereas punitive damages were thought to be capped only by the number of zeroes in the jury's imagination.

As this case illustrates, that supposed dichotomy is a false one, and indeed this Court's cases make clear that punitive and compensatory damages are subject to like constitutional restraints. In *Oberg*, this Court explained that the common law guaranteed the right to judicial supervision of a jury's verdict, and that the Due Process Clause incorporates that common-law guarantee; the cases on which the Court relied involved both compensatory and punitive damages. For example, the Court cited with approval a decision of the Supreme Court of New Hampshire setting aside *both* compensatory and punitive damages. 512 U.S. at 425 (citing *Belknap v. Boston & Me. R.R. Co.*, 49 N.H. 358, 374 (1870)). The same evident partiality that impeached the verdict as to one applied with equal force to the other.

Indeed, the Court took pains to note (citing the contribution of legal historians) that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century." *Oberg*, 512 U.S. at 422 n.2. Because common-law practice at the time of the Fourteenth Amendment's framing informs the protections of due process, it follows that due process protects against irrational compensatory and punitive awards equally.

In fact, the Due Process Clause's prohibition on unrestrained jury discretion applies to virtually *every* context in which the jury sits. Thus, for example, the Court unanimously invalidated a law permitting juries "broad and unlimited power" to impose court costs on prevailing defendants in criminal proceed-

ings. *Giaccio*, 382 U.S. at 403. Likewise, in criminal cases the basis for the jury's verdict must be discernible from the evidence. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (due process requires this "impinge[ment] upon 'jury' discretion"); *see also, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (disallowing damages based on the "value" of constitutional rights in constitutional-tort litigation, because "were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants"). As Justice Story put it, "I deny, that, in any case, civil or criminal, [the jury] ha[s] the moral right to decide the law according to their own notions, or pleasure." *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545). A verdict contrary to all the record evidence is nothing more than jury nullification, and due process does not countenance jury nullification in any form that deprives a litigant of liberty or property. *See, e.g.*, *Oberg*, 512 U.S. at 434–35.

D. This Court's recent cases have emphasized two factors that may mitigate against standardless jury discretion. *See, e.g.*, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19–22 (1991). Both are absent in this case, making the constitutional error in the jury's verdict all the more stark: The jury was not given instructions to confine its discretion, and there was no functioning system of judicial review to police the jury's compliance. Indeed, the jury was not instructed on respondent's disgorgement theory *at all* (and respondent's damages instruction was rejected), yet the West Virginia courts took no corrective action when the jury nonetheless returned an irrational damages verdict.

Moreover, even if the jury had been specifically cautioned not to return a verdict based on passion or prejudice, the absence of effective judicial review would deprive that instruction of any utility. "The problem that concern[ed this Court in *Oberg* was] the possibility that a jury will not follow [its] instructions and may return a lawless, biased, or arbitrary verdict" if it is not supervised by a judicial officer. 512 U.S. at 433. So too here, where the only review on the merits that the verdict received—at any level of the state judiciary—was the trial judge's statement that he was "concerned" by the verdict. Concern, unaccompanied by action, is not constitutionally adequate judicial review.

* * *

For each of these reasons, the West Virginia courts' failure to exercise their constitutionally mandated duty to set aside a baseless jury verdict is contrary to the decisions of this Court. Certiorari is warranted to prevent a recurrence of this basic error.

II. This Is A Suitable Case In Which To Clarify The Applicable Due Process Principles.

The trial court itself explained the significance of this case and others like it:

> There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. . . . And I'm going to allow all of these to go to a jury.

Pet. App. 47a.

The West Virginia courts' predilection for submitting cases to the jury, even when the material

facts are undisputed, makes this Court's review in this case all the more appropriate. If the West Virginia judiciary will not exercise a screening function *before* a case is submitted to the jury, then it is all the more important that the State's judges follow the Due Process Clause's requirement that they exercise that function *after* each verdict. The two-tier structure of the West Virginia judiciary reinforces the need for review in a case like this one: the absence of appellate review as of right—indeed, in this case, there was no appellate review on the merits at all—compounds the due process problem.[1]

Furthermore, this case presents an ideal vehicle for this Court to clarify the due process principles that govern judgment as a matter of law. Because there was *no* evidence of damages on the claim for breach of the confidentiality agreement as it was given to the jury, *any* judicial remedy—whether a judgment notwithstanding the verdict, a new trial, or a remittitur set at zero—would in this case afford DMS complete relief from the constitutional injury. *Cf. Oberg*, 512 U.S. at 432 n.10 (holding that the Constitution requires *some* judicial review of punitive damage awards, while reserving "the more difficult question of what standard of review is constitutionally required"); *Thompson v. City of Louisville*, 362 U.S. 199, 199 (1960) ("Decision of this question turns not on the sufficiency of the evidence, but on

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[1] Appellate review of civil cases in New Hampshire and Virginia is purely discretionary, as in West Virginia, and some other States permit only discretionary review of certain types of civil verdicts. *See, e.g.*, U.S. Dep't of Justice, Office of Justice Programs, *State Court Organization 2004*, at 133-35 tbl.22 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf; Ga. Code Ann. § 5-6-35(a)(6), (b).

whether this conviction rests upon any evidence at all."). Taking this case would allow the Court to decide the general due process issue while permitting the substance of the required judicial review to percolate further. Moreover, because the case arises from a state court, there is not even a hypothetical conflict between the applicable due process principles and the demands of the Seventh Amendment.

Respondent may attempt to argue that this case is a poor vehicle because the jury's award of $10.5 million in compensatory damages in fact rests on something rather than nothing.[2] But the documents that respondent cited in the lower courts were wholly unrelated to respondent's lost profits. Rather, they were a sales exhibit and a demonstrative exhibit, prepared by respondent's counsel, of alleged profits for a non-party subsidiary of *DMS's* parent company—with no evidence of any connection to *respondent's* loss of profits from the purported breach. Pet. App. 50a, 51a, 53a–56a.

Finally, the identity of the court below is no obstacle to this Court's review. This Court has often recognized the need to review such decisions. *See, e.g.*, *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (reviewing a decision of the West Virginia Circuit Court); *see also, e.g.*, *Flippo v. West Virginia*, 528 U.S. 11 (1999) (per curiam) (summarily reversing

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[2] In the courts below, respondent also raised the meritless objection that DMS's challenge to the insufficiency of the evidence had been forfeited by a failure to object to the closing argument delivered by respondent's counsel. *See, e.g.*, Resp.'s Response to Pet. for Appeal 38–39. Neither the decision below nor the denial of discretionary review rested on any such basis, and this red-herring argument presents no obstacle to this Court's review.

such a decision); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990) (per curiam) (same); *Nat'l Mines Corp. v. Caryl*, 497 U.S. 922 (1990) (per curiam) (same). Indeed, the structure of West Virginia's judiciary—in which appellate review can be denied by a bare majority of the State's high court—only heightens the need for this Court's scrutiny in federal constitutional matters. In this case, the denial of judicial review is part and parcel of the deprivation of due process that warrants this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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